CASE NBR: [91107051] CFY STATUS: [DECIDED

SHORT TITLE: [Tomala, Ana Feijoo]

VERSUS [United States] DATE DOCKETED: [012192]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Jan 21 1992	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Feb 20 1992		Order extending time to file response to petition until March 25, 1992.
5	Mar 25 1992		Brief of respondent United States filed.
6	Apr 2 1992		DISTRIBUTED. April 17, 1992
8	Apr 20 1992		REDISTRIBUTED. April 24, 1992
10	Apr 27 1992		REDISTRIBUTED. May 15, 1992
12	May 18 1992		Petition DENIED. Dissenting opinion by Justice White with whom Justice Thomas joins. (Detached opinion.)

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ORIGINAL 91-7051

No. 91-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ANA FEIJOO TOMALA,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the conscious avoidance charge approved by the Second Circuit, which permits a jury to convict when the evidence would have alerted a reasonable person to the unlawfulness of her conduct, unconstitutionally reduced the government's statutory burden to prove petitioner's knowledge that she was transporting illegal drugs.

2. Whether the court's precipitate declaration of a mistrial after the jury had deliberated for only one afternoon violated petitioner's right under the Double Jeopardy clause to have her trial "completed by a particular tribunal." Arizona v. Washington, 434 U.S. 497, 503 & n. 11 (1978).

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OTHER AUTHORITIES

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner Ana Feijoo Tomala respectfully requests that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit that affirmed a judgment of the United States District Court for the Eastern District of New York dated March 6, 1991, convicting her of importation of cocaine, 21 U.S.C. § 952(a), 960(b)(2)(B)(ii) and 18 U.S.C. § 3551 et seq., and sentencing her to five years of imprisonment to be followed by four years of supervised release.

OPINION BELOW

The Court of Appeals rendered an unpublished opinion affirming petitioner's sentence on September 27, 1991, which is annexed as Appendix A. The Court of Appeals denied petitioner's petition for rehearing on November 4, 1991. The order denying rehearing is annexed as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on November 18, 1991. See Appendix A. No application has been filed for an extension of time within which to file this petition. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Due Process Clause of the Fifth Amendment:

> [N]or deprived of life, liberty, or property, without due process of law.

Double Jeopardy Clause of the Fifth Amendment:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.

STATEMENT OF THE CASE

The Facts Relevant to Conscious Avoidance

The government's case against petitioner consisted of proof that a suitcase containing dresses that she brought into the United States had cocaine secreted in it. Since the cocaine was hidden in the sides of the suitcase, the critical issue was whether petitioner had knowledge of its presence. At trial, the government argued that petitioner had actual knowledge that the suitcase contained cocaine, not that she consciously avoided learning that cocaine was in the suitcase. The government never offered any evidence that petitioner was promised or received money for taking the suitcase, or that the cocaine was visible to anyone making a cursory examination of the suitcase's contents.

The defense case was that petitioner was an innocent dupe, who had looked in the suitcase and seen only that it contained dresses, and that she had accepted the suitcase in accordance with Ecuadorian custom which dictated that favors of this kind be done even for a stranger. Petitioner testified that she had

looked hastily at the telephone number and address she had been given for the person she was supposed to deliver the suitcase to in New York, which was why she had not noticed that the information was incomplete. Moreover, when petitioner was stopped at the airport, she exclaimed "Damn it, wny did I bring it for this woman. This woman gave it to me in the airport in Ecuador."

Not only was a conscious avoidance instruction not factually warranted but the charge given improperly created a presumption of guilt. The charge did not state that before finding conscious avoidance the jury had to find that petitioner had purposely avoided leaning the truth about the presence of drugs in the suitcase. Instead, it stated:

> ...[I]t is not necessary for the government to prove to an absolute certainty that the defendant knew that she possessed narcotics. The defendant's knowledge may be established by proof beyond a reasonable doubt that the defendant was aware...of a high probability that the suitcase contained narcotics unless, despite this high probability, the facts show that the defendant actually believed that the suitcase did not contain narcotics.

Petitioner argued that the charge was erroneous in that it failed to inform the jury that Feijoo had to have deliberately closed her eyes to the truth about the contents of the suitcase in order for the jury to conclude that the government had met its burden of proving conscious avoidance.

The Facts Relevant to Double Jeopardy

Two trials were held in this case, and petitioner argued on appeal that the second trial should not have been held because the first trial was aborted by the judge over the defendant's (and the government's) objection and without "manifest necessity" for a mistrial.

After a two-and-a-half day trial, jury deliberations began at approximately 12:30 P.M. Thereafter, the jury sent out notes at 4:05 P.M. and 5 P.M. stating that it did not think it could reach a decision. However, a 5:45 P.M. note, which was seized upon by the court to declare a mistrial, stated only that the jury had not as of that moment reached a unanimous verdict (and gave no indication that the jury expected or wished to be discharged).

The first note (at 4:05 P.M.) was immediately followed by a note requesting that a portion of one government witness' testimony be re-read, indicating that the jury was hardly at a critical impasse at that time. The court responded to the second note by telling the jury that it had not spent enough time deliberating and suggesting that it might return after the weekend to resume deliberations. At 5:45 P.M. the jury sent out a note that it had not reached a decision and that one juror had to leave for religious observance at 6 P.M. Over both defense and

government opposition,[1] the court announced that it would declare a mistrial, and then questioned the jury foreman about whether further deliberations would be productive (the foreman reported that some jurors felt that resuming deliberations after the weekend might produce a verdict).

The Second Circuit's Opinion

With respect to conscious avoidance, the Court held that it was appropriate for the court to give such a charge. The panel stated that such a charge is appropriate "when the evidence demonstrates that the circumstances would have alerted a reasonable person of the unlawful nature of his conduct." Noting that petitioner acknowledged that she had accepted a suitcase from a stranger to bring to the United States "without further intelligible instructions" the panel concluded that the conscious avoidance charge was warranted. The Court did not address petitioner's claim that the charge given by the district court was improperly formulated.

With respect to petitioner's double jeopardy argument, the Second Circuit held that the second trial was not barred on double jeopardy grounds because the district court's declaration of a mistrial came after it had given an Allen charge and after the jury had announced that it was hopelessly deadlocked.

[1] The prosecutor stated: "I would [join] in [defense counsel's] request that they be asked to come back and try again, if not tomorrow, then Monday."

REASONS FOR GRANTING THE WRIT

POINT I: THE SECOND CIRCUIT'S APPROVAL OF A "CONSCIOUS AVOIDANCE" INSTRUCTION AT PETITIONER'S TRIAL FOR NARCOTICS TRAFFICKING RAISES AN IMPORTANT QUESTION OF FEDERAL LAW AS TO WHICH THERE IS A CONFLICT AMONG THE CIRCUITS.

In affirming petitioner's conviction for drug importation, the Second Circuit approved of the district court's "conscious avoidance" instruction. In doing so, the court reduced the conscious avoidance standard to, at most, recklessness, vitiating the statutory requirement that the government prove petitioner acted knowingly in importing drugs.[2] This instruction, as well as conscious avoidance instructions approved by the Second Circuit in recent reported decisions, see pp. 12-13, infra, is inconsistent with the law of other circuits. The Court should grant this writ to resolve the conflict among the circuits and to

[2] The statute under which petitioner was convicted, 21 U.S.C. § 960 (a), provides:

> "(a) Any person who --
>
> (1) contrary to section 952, 953 or 957 of this title, knowingly or intentionally imports or exports a controlled substance,
>
> *****
>
> shall be punished as provided in subsection (b) of this section."

answer the previously unaddressed question[3] of whether a statutory requirement of knowledge may be satisfied by a showing of conscious avoidance, and if so what that showing must include.

Introduction

One form or another of conscious avoidance instruction has been approved in each of the circuits.[4] The instruction is meant to allow the jury to "impose criminal liability on people who, recognizing the likelihood of wrongdoing, nonetheless consciously refuse to take basic investigatory steps." United States v. Rothrock, 806 F.2d 318, 323 (1st Cir. 1986) (emphasis added). In perhaps the most widely cited analysis of conscious avoidance, United States v. Jewell, 532 F.2d 697 (9th Cir. 1976) (en banc), cert. denied, 426 U.S. 951 (1976), the Ninth Circuit concluded that conscious avoidance requires that the defendant's ignorance be "solely and entirely a result of... a conscious purpose to avoid learning the truth." Id. at 704. This ignorance must result from "a calculated effort to avoid sanctions of the statute while violating its substance." Ibid. See also United States v. Pacific Hide & Fur Depot, Inc., 768 F.2d 1096, 1098 (9th Cir. 1985) (the government must "present evidence that the defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of subsequent prosecution"). A finding of conscious avoidance is appropriate only where "it can almost be said that the defendant actually knew." United States v. Jewell, 532 F.2d at 704 (quoting G. Williams, Criminal Law: The General Part, §57 at 159 (2d ed. 1961)).

The Instruction Given was Factually Unwarranted and Improperly Formulated

In this case, a conscious avoidance charge was neither factually warranted nor properly formulated. The government did not argue its case on a conscious avoidance theory, nor did it produce evidence that petitioner consciously refused to learn the facts regarding the cocaine contained in the suitcase, a prerequisite for a conscious avoidance charge. Contrary to the panel's conclusion, that petitioner accepted the suitcase from a stranger "without further intelligible instructions" may evidence carelessness, but does not show that petitioner deliberately sought to avoid knowing that there were drugs in the suitcase.

Moreover, the district court's instruction made no reference to the requirement that the jury find petitioner had purposely

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[3] In two cases this Court has touched on the related issue of when knowledge can be inferred from circumstances. Turner v. United States, 396 U.S. 398, 416 n.29 (1970) (adopting proposed Model Penal Code definition of knowledge to infer defendant's knowledge that heroin he sold was imported); Leary v. United States, 395 U.S. 6, 46 n.93 (1969) (adopting proposed Model Penal Code definition of knowledge to negate inference of defendant's knowledge that marihuana he possessed was imported).

[4] The significance of the issue raised by this petition is reflected in a Westlaw search which shows that since 1970 there have been over one hundred reported circuit court decisions involving challenges to the application or formulation of conscious avoidance charges.

avoided knowing about the cocaine. The Second Circuit's approval of the instruction without this requirement drastically diminishes the showing the government is required to make to prove conscious avoidance. In so doing, it violates petitioner's constitutional right to have the government carry the burden of proving beyond a reasonable doubt that she knowingly transported narcotics. In re Winship, 397 U.S. 358, 364 (1970).

Having approved a conscious avoidance charge that equated knowledge with recklessness, the panel went even further, and approved the giving of a conscious avoidance charge whenever "evidence demonstrates that the circumstances would have alerted a reasonable person of the unlawful nature of his conduct." By approving the instruction when the evidence points only to negligence, the Second Circuit invites the jury to convict not on a finding of knowledge or even recklessness, both of which require awareness by the defendant, but on a finding "that the defendant should have known his conduct was illegal." United States v. Garzon, 688 F.2d 607, 609 (9th Cir. 1982) (emphasis in original). Yet "true ignorance, no matter how unreasonable, cannot provide a basis for criminal liability when the statute requires knowledge." United States v. Jewell, 532 F.2d at 707 (9th Cir. 1976) (Kennedy, J., dissenting). For this reason, a conviction based on conscious avoidance requires that "the defendant had subjective knowledge of his criminal behavior," i.e., that his "ignorance of an operant fact was deliberate."

United States v. de Francisco-Lopez, 939 F.2d 1405, 1409-10 (10th Cir. 1991) (emphasis added). To hold otherwise, as the Second Circuit panel did in this case, in effect creates "a presumption of guilt." United States v. Murrieta-Bejarano, 552 F.2d 1323, 1325 (9th Cir. 1977).

The Conflict Among the Circuits

The Second Circuit's recent holdings on the content and the circumstances justifying a conscious avoidance instruction conflict with the law of other circuits.

In accordance with this Court's holdings in Leary and Turner (see n.4), each circuit has incorporated into its definition of conscious avoidance the Model Penal Code definition of knowledge -- that knowledge of a fact is established "if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."[5] Except for the Second Circuit, whose most recent pronouncements have omitted this require-

[5] Model Penal Code, §2.02(7) (Official Draft and Revised Comments 1985). See, e.g., United States v. Picciandra, 788 F.2d 39 (1st Cir.), cert. denied, 479 U.S. 847 (1986); United States v. Lanza, 790 F.2d 1015 (2d Cir. 1986); United States v. Caminos, 770 F.2d 361 (3d Cir. 1985); United States v. Martin, 773 F.2d 579 (4th Cir. 1985); United States v. Restrepo-Granda, 575 F.2d 524 (5th Cir.), cert. denied, 439 U.S. 935 (1978); U.S. v. Thomas, 484 F.2d 909 (6th Cir.), cert. denied, 414 U.S. 912 (1973); United States v. Moser, 509 F.2d 1089 (7th Cir. 1975); United States v. Cooperative Grain and Supply Co., 476 F.2d 47 (8th Cir. 1973); United States v. Jewell, 532 F.2d 697 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976); Griego v. United States, 298 F.2d 845 (10th Cir. 1962); United States v. Rivera, 944 F.2d 1563 (11th Cir. 1991).

ment, all the circuits have added to this two-part definition a third component: that the defendant acted deliberately, willfully or purposefully to avoid learning the truth. It is this third element that sets conscious avoidance apart from reckless disregard for the truth.

The Second Circuit's recent decisions on conscious avoidance have rejected the deliberateness test outlined in Jewell and in its own prior decisions.[6] Thus, in United States v. Feroz, 848 F.2d 359, 360 (2d Cir. 1988), the Second Circuit approved a conscious avoidance instruction consisting only of the Model Penal Code definition of knowledge: "knowledge of the existence of a particular fact is established (1) if a person is aware of a high probability of its existence, (2) unless he actually believes that it does not exist." See also United States v. Mang Sun Wong, 884 F.2d 1537, 1541 (2d Cir. 1989), cert. denied, 493 U.S. 1082 (1990).

The Second Circuit's approval of the instruction without the

[6] The Second Circuit has on prior occasions adopted some form of the Jewell deliberateness test for conscious avoidance. See, e.g., United States v. Guzman, 754 F.2d 482, 488 (2d Cir. 1985) (conscious avoidance requires finding that defendant "deliberately refused to learn the specific facts"); United States v. Aulet, 618 F.2d 182, 191 (2d Cir. 1980) (conscious avoidance charge must include reference to "purposeful avoidance of the truth"). The Aulet - Guzman deliberateness requirement has been overruled sub-silentio by the Second Circuit's decisions in United States v. Feroz, 848 F.2d 359, 360 (2d Cir. 1988) and United States v. Mang Sun Wong, 884 F.2d 1537, 1541 (2d Cir. 1989), cert. denied, 493 U.S. 1082 (1990).

Jewell deliberateness test sets it apart from other circuits. See, e.g., United States v. Picciandra, 788 F.2d 39, 46 (1st Cir. 1986) (conscious avoidance charge appropriate only where "the facts suggest a conscious course of deliberate ignorance"); United States v. Caminos, 770 F.2d 361 (3d Cir. 1985) (approving conscious avoidance charge requiring jury to find that "defendant deliberately closed his eyes to what otherwise would have been obvious to him"); United States v. Martin, 773 F.2d 579, 584 (4th Cir. 1985) (approving conscious avoidance instruction requiring finding of "conscious purpose" and "deliberate closing of the eyes"); United States v. Chen, 913 F.2d 183, 190-91 (5th Cir. 1990) (conscious avoidance occurs "only where it can almost be said that the defendant actually knew"); United States v. Gullett, 713 F.2d 1203, 1212 (6th Cir. 1983), cert. denied, 464 U.S. 1069 (1984) (conscious avoidance instruction designed to prevent defendant "from escaping conviction merely by deliberately closing his eyes" to the truth); United States v. Nazon, 940 F.2d 255, 258 (7th Cir. 1991) (approving conscious avoidance instruction requiring finding that defendant "shut his eyes for fear of what he would learn"); United States v. Bussey, 942 F.2d 1241, 1246 (8th Cir. 1991) (conscious avoidance occurs only where defendant had "a conscious purpose to avoid enlightenment"); United States v. Alvarado, 838 F.2d 311, 314 (9th Cir. 1987), cert. denied, 487 U. S. 1222 (1988) (instruction warranted only where defendant purposely "contrived to avoid learning all of the

facts in order to have a defense in the event of a subsequent prosecution"); United States v. de Francisco-Lopez, 939 F.2d at 1409 (10th Cir., 1991) (defendant's acts to avoid truth must be "deliberate and not equivocal"); United States v. Rivera, 944 F.2d 1563, 1571 (11th Cir. 1991) (defendant must have "purposely contrived" to avoid learning the truth); United States v. Jack, 890 F.2d 1250 (D.C. Cir. 1989) (conscious avoidance instruction warranted only where defendant "deliberately failed to investigate the matter in order to remain ignorant of the truth").

Not only does the Second Circuit not require that a conscious avoidance charge incorporate the notion that the defendant deliberately and purposefully shut her eyes to the truth, but the Second Circuit's approach conflicts in another way with that of the Fifth, Ninth, Seventh and Eleventh Circuits. These Circuits require the presence of facts indicating deliberate ignorance before a conscious avoidance charge may be given. United States v. Batencort, 592 F.2d 916, 918 (5th Cir. 1979); United States v. Lennartz, 948 F.2d 363, 368-69 (7th Cir. 1991); United States v. Murrieta-Bejarano, 552 F.2d 1323 (9th Cir. 1977); United States v. Rivera, 944 F.2d 1563 (11th Cir. 1991). The Second Circuit, however, requires merely that the "surrounding circumstances" be such that "reasonable persons could have concluded that the circumstances alone should have apprised defendant[] of the unlawful nature of [her] conduct." United States v. Mang Sun Wong, 884 F.2d at 1541. Indeed, the Second Circuit has acknowledged that it and the Ninth Circuit, at least, "arguably have different views concerning use of the 'conscious avoidance' charge." Mang Sun Wong, 884 F.2d at 1542 n.5. In Mang Sun Wong, the Second Circuit contrasted its view with United States v. Alvarado, 838 F.2d at 314, in which the Ninth Circuit observed that "cases in which the facts point to deliberate ignorance are relatively rare."

The Instruction Encroached on the Legislature's Domain

Moreover, the charge approved by the Second Circuit impermissibly encroached on the domain of the legislature. See Morissette v. United States, 342 U.S. 246, 263 (1952); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 93, 95-96 (1820). By focusing exclusively on petitioner's alleged awareness that there was a "high probability" that the suitcase contained narcotics, the approved instruction reduced the conscious avoidance standard to one of at most recklessness: it required the jury to find only that petitioner was aware of a high probability that the suitcase contained drugs, and that she recklessly transported the suitcase without investigating further. Yet recklessness is a distinctly lower standard for the government to meet than the statutory requirement of knowledge. In approving the conscious avoidance instruction used here, the Second Circuit has run afoul of the "spirit of the doctrine which denies to the federal judiciary power to create crimes," which also admonishes the courts not to "enlarge the reach of enacted crimes by consti-

tuting them from anything less than the incriminating components contemplated by the words used in the statute." Morissette v. United States, 342 U.S. at 263. See also Robbins, "The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea," 81 J. Crim. L. & Criminology 191, 231-234 (1990).

* * *

The Second Circuit has relaxed the standard of conscious avoidance, intended as a "strictly limited exception" to the requirement of actual knowledge, Jewell, 532 F.2d at 700, to one of recklessness or even mere negligence. In this case it approved a conscious avoidance instruction that was neither factually warranted nor properly formulated. This error was compounded by the panel's statement that the faulty instruction is appropriate whenever "evidence demonstrates that the circumstances would have alerted a reasonable person of the unlawful nature of his conduct." The panel's approach greatly reduces the government's burden to prove knowledge beyond a reasonable doubt and encroaches on the prerogatives of the legislature. This Court, which has not previously addressed conscious avoidance, should grant this writ to settle an important and frequently litigated question of federal law and to resolve the conflict between the Second and other circuits.

POINT II: DOUBLE JEOPARDY LAW BARRED PETITIONER'S SECOND TRIAL, SINCE THERE WAS NO "MANIFEST NECESSITY" FOR THE MISTRIAL DECLARATION.

Certiorari should also be granted because the Second Circuit's denial of petitioner's double jeopardy claim conflicts with applicable decisions of this Court.

If a trial court declares a mistrial without the defendant's consent, a retrial is barred on Double Jeopardy grounds unless there was "manifest necessity" for the mistrial. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824). In deciding whether to declare a mistrial, a trial judge cannot slight a defendant's "valued right to have his trial completed by a particular tribunal," Wade v. Hunter, 336 U.S. 684 (1949); in a close case, doubts about whether a mistrial was properly granted are to be resolved in favor of barring retrial. Downum v. United States, 372 U.S. 734, 738 (1963).

A "genuinely deadlocked" jury may be discharged without implicating the Double Jeopardy clause, Arizona v. Washington, 434 U.S. 497, 509 (1978), and a trial judge's decision to declare a mistrial when he considers the jury deadlocked is properly accorded deference by a reviewing court. Ibid. Deference is accorded because the trial court is believed to be in the best position to weigh all the factors that must be considered in making the determination whether the jury will be able to reach a just verdict if it continues to deliberate. Id., n. 28.

On the other hand "[i]f the record reveals that the trial

judge has failed to exercise the 'sound discretion' entrusted to him, the reason for such deference by an appellate court disappears." Ibid. In Arizona v. Washington, 434 U.S. at 509, this Court explained the dangers being guarded against:

> On the one hand, if [the trial judge] discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his "valued right to have his trial completed by a particular tribunal." But if he fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.

In United States v. Jorn, 400 U.S. 470, 487 (1971), the plurality opinion declared that the trial judge had abused his discretion in discharging the jury: the court had acted precipitately, not giving due consideration to the possibility of alternatives to a mistrial, such as a continuance. In short, the trial court had made no effort to "exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the sua sponte declaration of this mistrial."

In petitioner's case, the absence of jury deadlock is evidenced by the fact that, after the 5:45 p.m. note, both the government and the defense requested that the jury be permitted to continue its deliberations. See Arizona v. Washington, 434 U.S. at 505 (prosecutor must "shoulder the burden of justifying the mistrial...[and] demonstrate 'manifest necessity' for any

mistrial declared over the objection of the defendant"). Although the panel opinion stated that there were three statements by the jury that it was "hopelessly deadlocked," that is a misstatement of the record. See p. 6-7, supra.

In seizing upon a jury note after only a few hours of deliberation as a springboard for declaration of a mistrial, the district court acted without the requisite sound basis for concluding that the jury was "hopelessly deadlocked" and thereby violated petitioner's "valuable right to have [her] trial completed by a particular tribunal." Arizona v. Washington, 434 U.S. at 503. Certiorari should accordingly be granted because the Second Circuit has decided the question of whether the Double Jeopardy clause barred petitioner's retrial in a way that conflicts with applicable decisions of this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
January 17, 1992

Respectfully submitted,

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89-cr-795
Bartels

RKW

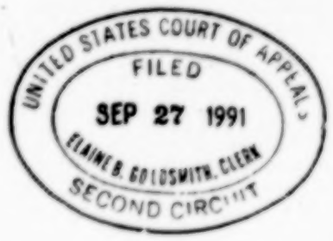
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty seventh day of September , one thousand nine hundred and ninety one .

Present:

Honorable J. Edward Lumbard,
Honorable Ralph K. Winter,
Honorable Frank X. Altimari,
Circuit Judges.



UNITED STATES OF AMERICA,
Appellee,

v.

ANA LENOR FEIJOO-TOMALA,
Defendant-Appellant.

O R D E R
91-1233

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Ana Lenora Feijoo-Tomala appeals from her conviction by a jury before Judge Bartels. Appellant argues that the district court abused its discretion by declaring a mistrial because of a hung jury at her first trial and that her second trial was thus barred on double jeopardy grounds.

We reject this claim. A trial judge may declare a mistrial in a criminal case without the consent of the defendant if he or she finds a "manifest necessity" to do so. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824). A grant of a mistrial is entitled to the "highest degree of respect" and is not to be disturbed absent an abuse of discretion. Arizona v. Washington, 434 U.S. 497, 511 (1978); Hameed v. Jones, 750 F.2d 154, 161 (2d Cir. 1984).

A trial judge's belief that a jury is deadlocked is "the most common form of 'manifest necessity'" justifying a mistrial. Oregon v. Kennedy, 456 U.S. 667, 672 (1982) (hung jury the prime example of manifest necessity); Arizona v. Washington, 434 U.S. 497 (1978). Although Judge Bartels declared a mistrial after the jury had deliberated only three and one-half hours, a finding of manifest necessity is not a mechanical determination subject to mathematical limits. United States v. Klein, 582 F.2d 186, 193 (2d Cir. 1978). A judge may properly take other factors into account along with the length of deliberation, such as complexity of the issues involved. See Arnold v. McCarthy, 566 F.2d 1377,

1387 (9th Cir. 1978) (citations omitted). Where the issues are complex, an announcement of irreconcilable differences after brief deliberations may suggest that a jury has not fully analyzed the matter. Where the issues are simple and clear-cut, brief deliberations may reveal well-considered differences that cannot be resolved. Moreover, a jury's statement that it is unable to come to a verdict is the most crucial factor to be considered. United States v. Lorenzo, 570 F.2d 294, 299 (9th Cir. 1978). In the instant case, the court did not abuse its discretion in declaring a mistrial after giving an Allen charge twice and after the jury had announced three times that it was hopelessly deadlocked on what the court determined to be a rather simple criminal case. The second trial was thus not barred on double jeopardy grounds.

Appellant also claims that she was prevented from receiving a fair second trial because of the court's alleged bias against the defense and its interference with defense counsel's presentation. We disagree. We have consistently recognized that it is a trial court's responsibility to insure that evidence is presented to the jury in an understandable manner, and the court's role is "not restricted to that of a mere umpire or referee." United States v. Mazzilli, 848 F.2d 384 (2d Cir. 1988) (citing United States v. DiTommaso, 817 F.2d 201, 221 (2d Cir. 1987)). A new trial is thus warranted only when the judge's conduct denied the defendant a

fair trial. DiTomasso, 817 F.2d at 220. The evidentiary rulings cited by appellant and alleged limiting of defense questioning were well within the bounds of judicial discretion and did not deprive appellant of a fair trial.

Additionally, Feijoo-Tomala claims that the court erroneously disallowed defense expert testimony on Ecuadorian travel practices. We will overturn a decision regarding admittance of expert testimony only when the court's decision was "manifestly erroneous." United States v. Brown, 776 F.2d 397, 400 (2d Cir. 1985); United States v. Campino, 890 F.2d 588, 593 (2d Cir. 1989), cert. denied, 111 S. Ct. 179 (1990). No such error occurred in this case.

Appellant's defense to the narcotics trafficking offense was that she unwittingly carried narcotics for a citizen of Ecuador who approached her at the airport and asked her to deliver the suitcase to a friend in the United States. Feijoo-Tomala sought to call an expert to testify that it was common for Ecuadorians to carry packages for each other to foreign countries, but the trial judge disallowed the testimony. This was not error. See United States v. Navarro-Varelas, 541 F.2d 1331, 1333-34 (9th Cir. 1976) (no abuse of discretion to exclude expert testimony that the practice of hiding narcotics in secret compartments in the luggage of unsuspecting travelers was a common scheme of drug smugglers), cert. denied, 429 U.S. 1045 (1977). We agree with the district

court that it is not clear what the testimony would have added other than to bolster marginally Feijoo-Tomala's testimony regarding her professed ignorance of the narcotics stash, if that. Appellant's view of the facts was that, at the airport in Ecuador and on her way back to the United States, she was approached by a complete stranger and agreed to deliver the suitcase for the stranger to a person in the United States. Feijoo-Tomala did not know this person and had only a purported address scribbled on a piece of paper that included no town. Appellant did not inquire as to how or where to deliver the suitcase, and the stranger disappeared moments after handing over the suitcase. Even as proffered, the expert testimony did not support that story. In sum, the district court's judgment that no expert was needed to explain the "cultural context" of Feijoo-Tomala's conduct at the Ecuadorian airport was not "manifestly erroneous."

Finally, Feijoo-Tomala faults the district court's jury instructions on two grounds. First, she contends that the instructions concerning credibility created the risk that the jury would use a "prejudicial standard" in evaluating her testimony. We disagree. In United States v. Matias, we made clear that a court's instruction regarding a defendant's credibility is "balanced" by using language which conveys the basic message that a defendant's testimony should be judged no differently than that of any other witness. United States v. Matias, 836 F.2d 744, 750

(2d Cir. 1988) (citations omitted). In the instant case, the district court repeatedly used such balanced language in its instructions regarding both the appellant's testimony and that of law enforcement officials. Therefore, the credibility instruction could not have prejudiced the jury.

Second, appellant contends that the district court erroneously instructed the jury on her conscious avoidance, pointing to the fact that the government offered no proof that Feijoo-Tomala purposely avoided learning of the hidden cocaine. The purpose of a conscious avoidance charge is to allow the jury "to impose criminal liability on people who, recognizing the likelihood of wrongdoing, nonetheless consciously refuse to take basic investigatory steps." United States v. Rothrock, 806 F.2d 318, 323 (1st Cir. 1986). Such a charge is appropriate when the evidence demonstrates that the circumstances would have alerted a reasonable person of the unlawful nature of his conduct. United States v. Mang Sum Wong, 884 F.2d 1537, 1541 (2d Cir. 1989) (quoting United States v. Guzman, 754 F.2d 482, 489 (2d Cir. 1985), cert. denied, 474 U.S. 1054 (1986)), cert. denied, 110 S. Ct. 1140 (1990).

Given appellant's view of the facts that included accepting a suitcase from a stranger to be brought to the United States without further intelligible instructions, the district court was more than justified in concluding that the conscious avoidance

charge was warranted.

Affirmed.

Hon. J. Edward Lumbard, U.S.C.J.

Hon. Ralph K. Winter, U.S.C.J.

Hon. Frank X. Altimari, U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of October one thousand nine hundred and ninety one.

Present: Hon. J. EDWARD LUMBARD
RALPH K. WINTER
FRANK X. ALTIMARI

Circuit Judges,

UNITED STATES OF AMERICA,
APPELLEE,

v.

ANA LENOR FEIJOO TOMALA,
DEFENDANT-APPELLANT.

Docket No. 91-1233

A petition for a rehearing having been filed herein by Appellant, Ana Lenor Feijoo-Tomala.
Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Elaine B. Goldsmith,
Clerk

No. 91-7051

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ANA FEIJOO TOMALA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury as to the definition of knowledge.

2. Whether the Double Jeopardy Clause precluded a retrial after the district court declared a mistrial because of the jury's inability to reach a unanimous verdict.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. 91-7051

ANA FEIJOO TOMALA, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-7A) is unreported, but the judgment is noted at 946 F.2d 883 (Table).

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1991. A petition for rehearing was denied on November 4, 1991. Pet. App. B. The petition for a writ of certiorari was filed on January 21, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a second jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of

importing cocaine into the United States, in violation of 21 U.S.C. 952(a). She was sentenced to 60 months' imprisonment and a four-year term of supervised release. The court of appeals affirmed. Pet. App. 1A-7A.

1. On October 28, 1989, petitioner, who was traveling with her two young daughters, arrived at Kennedy International Airport on a flight from Ecuador. She carried four bags, three of which she had checked as luggage; two of the checked bags were soft-sided, and the third was hard-sided. At Customs, petitioner produced her passport, Customs declaration, and airline ticket. In response to a question by a Customs inspector, petitioner explained that she had been on vacation in Ecuador with her children. Throughout her conversation with the inspector, petitioner was very calm and cooperative. 11/29/90 Tr. 85-86.

The inspector told petitioner that he would like to inspect her luggage. Petitioner remained calm and lifted one of the soft-sided bags onto a conveyer belt for examination. After examining the bag and finding nothing amiss, the inspector asked to examine a second bag. Maintaining her composure, petitioner reached for the second soft-sided bag. The inspector indicated, however, that he wished to examine the hard-sided bag. Petitioner's demeanor immediately changed; her "face change[d]," she became "very serious and very stiff," and she was "[n]ot as helpful as before." 11/29/90 Tr. 89. As the inspector examined the bag, petitioner "suddenly froze in her tracks" and ceased cooperating entirely.

11/29/90 Tr. 93. She paced back and forth, jangled her keys, and alternately moved her hands in front of her and behind her. Ibid.

The only visible contents of the second suitcase were several apparently new dresses. After noticing a weight imbalance in the suitcase, the inspector probed further and discovered a false panel in the suitcase, inside of which were secreted several bags containing three kilograms of cocaine. When the inspector opened the false panel, petitioner "went crazy," began pounding the table, and yelled: "Damn it, why should I bring this here? Why should I bring it for this woman? This woman gave it to me in the airport in Ecuador." 11/29/90 Tr. 96, 99, 123; 12/3/90 Tr. 340. After making several similar statements, petitioner shrugged her shoulders and stated that she did not know what the substance hidden in the bags was. Ibid.

The inspector arrested petitioner and advised her of her Miranda rights. After waiving her rights, petitioner repeated that a woman had given her the suitcase in which the cocaine had been found. 11/29/90 Tr. 126. Petitioner disclaimed any prior knowledge of the cocaine. She explained that while she was standing at the airline counter at the airport in Ecuador, a total stranger her approached her, called her by name, and identified herself as "Maria Alcivar." According to petitioner, Alcivar had handed her the suitcase and instructed her to deliver it to Alcivar's sister, "Georgina de Rodrigues" -- a person petitioner did not know. Petitioner further stated that Alcivar had not told her where and how to deliver the suitcase; rather, Alcivar had

merely provided her with an envelope and a piece of paper containing an incomplete New Jersey address and a New Jersey area code followed by an eight-digit telephone number. The address contained a semi-legible street name and the words "New Jersey," spelled phonetically. However, the paper, which petitioner provided the inspector, failed to specify the town or city in which Rodrigues lived. Petitioner stated that she did not know where Rodrigues lived or her actual telephone number. 11/29/90 Tr. 137-143.

2. Petitioner testified in her own defense at trial, claiming to have been duped into carrying cocaine into the United States. Petitioner stated that she had gone to Ecuador to obtain a permanent U.S. residence visa for her youngest daughter, an Ecuadoran citizen. 12/3/90 Tr. 301. Petitioner testified that a neighbor and co-worker, Mercedes Moran, had asked petitioner to deliver a letter to Moran's sister, and that she had done so. 12/3/90 Tr. 303-304. Moran's sister later telephoned petitioner and asked her to take a letter back to Moran. Petitioner agreed to do so, but was unable to tell Moran's sister when she would be leaving Ecuador. 12/3/90 Tr. 305-306.

Petitioner further testified that while she was standing at the airline counter prior to her return to the United States, a stranger called her name, identified herself as Maria Alcivar, and asked petitioner to carry a letter to Mercedes Moran, whom Alcivar identified as her cousin. According to petitioner, Alcivar asked her to deliver a suitcase to Alcivar's sister, Georgina De Rodrigues, whom petitioner did not know. Alcivar then gave

petitioner the envelope and paper that petitioner had supplied to the Customs inspector. Petitioner testified that Alcivar opened the suitcase to show petitioner the dresses inside, explaining that she was returning the dresses to her sister because she had been unable to sell them in Ecuador. Alcivar then disappeared. Petitioner further testified that she again checked the contents of the bag and then labeled the bag in her own name. 12/3/90 Tr. 310-317.

Petitioner, who had completed high school and earned a teaching certificate, 12/3/90 Tr. 323, claimed not to have noticed that the telephone number that Alcivar gave her contained an area code plus eight digits, rather than seven, and that the purported address did not include a town or city. She also testified that Alcivar gave her no instructions beyond telling her to call Rodrigues when she arrived home, and that Alcivar did not tell her what to do if she could not reach Rodrigues. 12/3/90 Tr. 337-339.

3. In its final charge, the district court instructed the jury:

> [T]he government must prove, beyond a reasonable doubt, that [petitioner] knew that the materials she possessed were narcotics. If [petitioner] lacks this knowledge -- if [petitioner] lacks this knowledge -- of course, you must bring in a verdict of acquittal.
>
> If [petitioner] lacks this knowledge then you must find her not guilty. * * * Even if the government proves that the only reason [petitioner] lacked such knowledge was because she was careless, negligent, or even foolish in failing to obtain it. That is not sufficient, the government must prove beyond reasonable doubt that she had that knowledge.
>
> However, it is not necessary for the government to prove to an absolute certainty that [petitioner] knew that she possessed narcotics. [Petitioner's] knowledge may be established by proof beyond a reasonable doubt that [petitioner] was aware, was aware of a high probability that the suitcase contained narcotics unless, despite this high probability, the facts show that [petitioner] actually believed that the suitcase did not contain narcotics.

12/4/90 Tr. 438-439.

3. The court of appeals affirmed petitioner's conviction. Pet. App. A1-A7. The court rejected petitioner's claim that the district court erred in instructing the jury concerning the knowledge element of the offense. Petitioner claimed that what she termed a "conscious avoidance" instruction was not warranted because the government offered no proof that petitioner had purposely avoided learning of the hidden cocaine. The court found the instruction to be appropriate "when the evidence demonstrates that the circumstances would have alerted a reasonable person [to] the unlawful nature of his conduct." Pet. App. A6. The court concluded that "[g]iven [petitioner's] view of the facts that included accepting a suitcase from a stranger to be brought to the United States without further intelligible instructions, the district court was more than justified in concluding that the conscious avoidance charge was warranted." Pet. App. A6-A7.

The court also rejected petitioner's claim that the district court denied her rights under the Double Jeopardy Clause when it declared a mistrial after the jury was unable to reach a verdict in her first trial. The court of appeals found that the declaration of a mistrial was manifestly necessary, after the district court

gave an Allen charge twice, and after the jury had three times announced that it was hopelessly deadlocked. Pet. App. A3.

ARGUMENT

1. The district court's instruction concerning the knowledge element of petitioner's offense is in our view unexceptionable. The instruction had its origin in the Model Penal Code § 2.02(7), which states:

> When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

That definition of knowledge was approved by this Court in Leary v. United States, 395 U.S. 6 (1969). In Leary, the defendant was charged with smuggling marijuana "knowing the same to have been imported." Id. at 10-11 & n.1. In determining the scope of the term "knowing," the court "employed as a general guide the definition of 'knowledge' which appears in [the Model Penal Code]." Id. at 46 n.93. Similarly, in Turner v. United States, 396 U.S. 398, 416 & n.29 (1970), the Court, citing Leary, employed the same definition of knowledge to conclude that the defendant "was aware of the 'high probability' that * * * heroin in his possession had originated in a foreign country," and that he thus "doubtless knew that the heroin he had came from abroad." See also Barnes v. United States, 412 U.S. 837, 845 (1973). The instruction is commonly used in "conscious avoidance" or "deliberate ignorance" cases, in which the defendant asserts that he lacked knowledge of

a crucial material fact -- frequently, as here, the fact that the materials in his possession were drugs.[1]

Although petitioner, the government, and the court of appeals referred to this instruction as a "conscious avoidance" instruction, the instruction in reality simply defines for the jury the level of certainty of a fact required to constitute "knowledge" of that fact for purposes of the criminal law.[2] In ordinary life, absolute certainty of facts -- other than those we directly perceive -- is rare or impossible. To require that a criminal defendant achieve such certainty before he can be said to "know" an operative fact would preclude conviction in virtually any case in which a defendant has committed an offense in reliance on information supplied by others. A defendant charged with knowingly receiving stolen property could not be convicted unless he himself

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[1] See Model Penal Code § 2.02(7), Comment (Definition of knowledge "deals with the situation British commentators have denominated 'wilful blindness' or 'connivance,' the case of the actor who is aware of the probable existence of a material fact but does not satisfy himself that it does not in fact exist."). For representative criminal cases in which the use of the instruction, or one of its variations, has been approved, see note 7, infra.

[2] Courts have sometimes employed other language, not including the Model Penal Code definition of knowledge, to address the conscious avoidance issue. See, e.g., United States v. Lara-Velasquez, 919 F.2d 946, 950-953 (5th Cir. 1990); United States v. DeVeau, 734 F.2d 1023, 1028 (5th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); United States v. Bigelow, 914 F.2d 966, 969-971 (7th Cir. 1990), cert. denied, 111 S. Ct. 1077 (1991); United States v. Hiland, 909 F.2d 1114, 1129-1131 (8th Cir. 1990); United States v. Valle-Valdez, 554 F.2d 911 (9th Cir. 1977); United States v. Gold, 743 F.2d 800, 822 (11th Cir. 1984), cert. denied, 469 U.S. 1217 (1985).

stole it;[3] a defendant charged with mail fraud could not be convicted absent direct evidence that he personally prepared and submitted the false bills upon which the scheme was based;[4] and a defendant, like petitioner, charged with importing drugs could not be convicted unless she personally observed the drugs in her suitcase. There is no evidence that Congress, when it drafted the applicable federal criminal statutes, intended such extreme results.

The form of the instruction used in this case, which tracks in all pertinent respects the Model Penal Code formulation approved by this Court, is accordingly correct. In a series of cases, the Second Circuit has approved the use of the instruction "when the evidence demonstrates that the circumstances would have alerted a reasonable person [to] the unlawful nature of his conduct." Pet. App. A6. See also United States v. Mang Sun Wong, 884 F.2d 1537, 1541 (2d Cir. 1989), cert. denied, 493 U.S. 1082 (1990); United States v. Feroz, 848 F.2d 359, 360 (2d Cir. 1988) (citing cases); United States v. McBride, 786 F.2d 45, 50 n.1, 51 (2d Cir. 1986). The Second Circuit has recognized that the instruction is commonly used, see United States v. Lanza, 790 F.2d 1015, 1022 (2d Cir.),

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[3] Cf., e.g., United States v. Jacobs, 475 F.2d 270, 287-288 (2d Cir.), cert. denied, 414 U.S. 821 (1973) (approving of use of Model Penal Code instruction where defendant is charged with receiving stolen property); United States v. Norwood, 798 F.2d 1094, 1098-1099 (7th Cir.) (same).

[4] Cf., e.g., United States v. Kaplan, 832 F.2d 676, 682-683 (1st Cir. 1987), cert. denied, 485 U.S. 907 (1988) (approving of use of Model Penal Code instruction where defendant is charged with mail fraud based on scheme to submit fraudulent medical bills).

cert. denied, 479 U.S. 861 (1986), and has held that the instruction may be given even in cases in which the government's primary theory is that the defendant was fully aware of the relevant fact. Mang Sun Wong, 884 F.2d at 1542.

Although we believe that the Model Penal Code instruction was a correct statement of the law and was properly given on the facts of this case, we agree with petitioner that the use of the instruction would likely have led to a different result had this case arisen in the Tenth Circuit. In two recent cases, for example, in which the defendants were charged with possession of drugs in circumstances quite analogous to those present here, the Tenth Circuit reversed the resulting convictions on the ground that an instruction like the one given in this case should not have been given.

In United States v. de Francisco-Lopez, 939 F.2d 1405 (10th Cir. 1991), the defendant was driving a car that had been altered to contain cocaine in a hidden compartment. He testified concerning the "unusual" circumstances under which he obtained the car from an individual named "Juan" in Los Angeles, who instructed him to drive it to New York "with minimal direction where he was to drop off the car." Id. at 1407; see also id. at 1417-1418 (Baldock, J., dissenting). He also testified that "he suspected at some point the car may have had drugs in it, but he dismissed the idea." Id. at 1411. The trial judge, employing a formulation almost identical to that used in this case, instructed the jury that:

> The defendant's knowledge may be established by proof that the defendant was aware of a high probability that the materials were narcotics unless despite this high probability the facts show that the defendant actually believed that the materials were not narcotics.

939 F.2d at 1411.

The Tenth Circuit reversed, holding that the instruction, which in its view "is rarely appropriate," 939 F.2d at 1405, improperly subjected the defendant "to an inference that he negligently avoided knowledge of the existence of drugs." Id. at 1412. According to the court, the instruction should not be given "unless evidence, direct or circumstantial, shows that defendant's claimed ignorance of an operant fact was deliberate." Id. at 1410. The court stated that "the same evidence cannot be used as proof for the mutually exclusive categories of actual knowledge of an operant fact and deliberate ignorance of that same fact" and "the deliberate ignorance instruction must not be tendered to the jury unless sufficient independent evidence of deliberate avoidance of knowledge has been admitted." Ibid. See also United States v. Galindo-Torres, No. 91-2020 (10th Cir. Jan. 30, 1992) (following Francisco-Torres on virtually identical facts). The Tenth Circuit's reasoning and results in Francisco-Lopez and Galindo-Torres are thus inconsistent with the reasoning and result of the Second Circuit in this case.[5]

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[5] The Tenth Circuit's decisions in Francisco-Lopez and Galindo-Torres appear to depart from prior Tenth Circuit cases in which use of the instruction was approved. See, e.g., United States v. Ochoa-Fabian, 935 F.2d 1139 (10th Cir. 1991), pet. for cert. pending, No. 91-6905; United States v. Fingado, 934 F.2d 1163 (10th Cir.), cert. denied, 112 S. Ct. 320 (1991).

The Ninth Circuit has taken a different approach to the use of the Model Penal Code definition of knowledge. Although that court has not disapproved the Model Penal Code instruction as such,[6] it has reversed convictions in which the Model Penal Code instruction was given if the evidence, in the court's view, did not present a question of deliberate ignorance. In those cases, as the court viewed the evidence, the defendant "had either actual knowledge or no knowledge at all of the facts in question." United States v. Sanchez-Robles, 927 F.2d 1070, (9th Cir. 1991) (emphasis in Sanchez-Robles; quotation omitted); see also United States v. Garzon, 688 F.2d 607 (9th Cir. 1982); United States v. Beckett, 724 F.2d 855 (9th Cir. 1984); United States v. Pacific Hide & Fur Depot, Inc., 768 F.2d 1096 (9th Cir. 1985). Like the Tenth Circuit cases, those decisions appear to rest on the proposition that the instruction causes "the risk that a jury might convict a defendant on mere negligence," Sanchez-Robles, 927 F.2d at 1073, and that it may thus be harmful error to use the instruction in a case in which "there were no suspicious circumstances surrounding the activity beyond direct evidence of the illegality itself, which goes only to actual knowledge." Ibid. In light of those holdings, the facts of this case may well have given rise to a contrary result had it arisen in the Ninth Circuit.

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[6] In United States v. Jewell, 532 F.2d 697 (9th Cir. 1976 (en banc), a leading case on the subject, both the majority, see id. at 700-702, 704 n.21, and dissenting opinions, see id. at 706-707 (Kennedy, J., dissenting), approved of the Model Penal Code formulation.

In our view, both the Ninth and Tenth Circuits have improperly limited the use of the Model Penal Code definition of knowledge -- the Tenth Circuit by authorizing its use only "rarely," if at all, and the Ninth Circuit by confining its use to cases in which the evidence points to conscious avoidance by the defendant. If, as we submit, the Model Penal Code definition properly defines the term "knowledge," as that term is used in federal criminal statutes, there should be no reason to reverse convictions when that definition is given, even if the facts of the case do not suggest conscious avoidance. If, as most circuits have held,[7] the instruction is a correct statement of the law, it is difficult to envision any circumstance in which its use could constitute reversible error. If the instruction is directly applicable to the facts of the case, as it was here, then a court is obligated to give it upon request. And if the instruction is not directly applicable to a particular case -- i.e., if the degree of certainty with which a defendant knows a fact is not an issue in the case -- then instructing the jury on a legally correct, but irrelevant, definition of knowledge would be at worst harmless error. Cf. Griffin v. United States, 112 S. Ct. 466 (1991).

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[7] See, e.g., United States v. Picciandra, 788 F.2d 39, 46-47 (1st Cir.), cert. denied, 479 U.S. 847 (1986); United States v. Caminos, 770 F.2d 361, 365-366 (3d Cir. 1985); United States v. Hester, 880 F.2d 799, 801-803 (4th Cir. 1989); United States v. Batencort, 592 F.2d 916 (5th Cir. 1979); United States v. Buckley, 934 F.2d 84, 88 (6th Cir. 1991); United States v. Kehm, 799 F.2d 354, 362 (7th Cir. 1986); United States v. Peddle, 821 F.2d 1521 (11th Cir. 1987).

In sum, we agree with petitioner that the circuits are in conflict concerning whether an instruction such as the one given in this case properly defines "knowledge" for purposes of the criminal law and thus can properly be given whenever knowledge is an issue in a criminal case. Since the issue arises quite frequently, further review by this Court to resolve the conflict is warranted.

2. Petitioner also claims (Pet. 16-18) that the Double Jeopardy Clause barred her second trial because there was no "manifest necessity" for the declaration of a mistrial at her first trial. The court of appeals properly rejected that claim.

a. Petitioner's first trial began on Wednesday, June 6, 1990. The government presented its entire case that day, and the defense began its presentation of evidence. The defense completed its case on June 7. The following morning, Friday, June 8, both sides gave their summations and the court gave its charge to the jury. At 12:26 p.m., the jury began its deliberations. 6/8/90 Tr. 96.

At 4:05 p.m., the jury sent a note to the court stating that it could not reach a unanimous decision. The court brought the jury back into the courtroom and, without objection by petitioner, delivered a modified Allen charge. At 4:16 p.m. the jury recommenced its deliberations. Half an hour later, the jury returned to the courtroom to rehear relevant testimony that it had earlier requested to have reread. At 5:00 p.m. the jury again retired to continue its deliberations. 6/8/90 Tr. 103-108.

Subsequently, the jury sent another note indicating that it was deadlocked. The judge expressed concern that the jury was not

taking the matter seriously, inasmuch as two jurors had been laughing during the Allen charge, and another juror did not seem to think the case was very important. The judge told the parties that he would instruct the jury to take its deliberations more seriously and would ask them if they wished to return Monday to continue their deliberations. 6/8/90 Tr. 108-109.

Thereafter the court instructed the jury about the serious nature of jury service and the need to make every attempt to reach a verdict. When one juror advised the court that there were "extremes at each end," and that he did not think the jury would be able to reach a verdict (6/8/90 Tr. 110), the court instructed the jury to try again: "I just want you to try, just try it again * * *. Go back and see if you can reach some sort of conclusion. If you can't, I am not going to force you, you understand that." Ibid. Defense counsel indicated his approval of that charge. Id. at 111. The jury again retired to deliberate at 5:15 p.m. Id. at 110.

Thirty minutes later, at 5:45 p.m., the jury sent a final note indicating that it still had not reached a unanimous verdict, and that one juror for religious reasons could not deliberate past 6:00 p.m. Both parties indicated a willingness to have the jury continue its deliberations the following Monday. The court voiced its doubt that further deliberations would prove useful, but stated that it would first speak to the foreman to determine if a verdict was possible. 6/8/90 Tr. 111. The court stated that it was "perfectly willing to come Monday, but if it's useless, what's the

point?" Id. at 111-112. Thereafter, the following colloquy occurred:

> THE COURT: [T]he real important issue is whether or not you can possibly come to a decision. Now, will the foreman stand up? Do you think you can come to a decision if you come here Monday?
>
> THE FOREMAN: No.
>
> THE COURT: Anyone else think they can come to a decision if we have further deliberations Monday? Anyone think that? Is it possible, you believe?
>
> THE FOREMAN: Agreed.
>
> THE COURT: Do you want to come in Monday?
>
> THE FOREMAN: We were talking in the room we said Monday but then some people said also they wouldn't change their mind. They wouldn't change their mind whatever happen[s].
>
> THE COURT: Members of the jury, I declare a mistrial because of your failure to get together * * *. The jury is hereby dispersed * * *.
>
> [DEFENSE COUNSEL]: If we have to report next week anyway, if the juror has the --
>
> THE COURT: I understand that, but you heard me declare a mistrial.
>
> [DEFENSE COUNSEL]: Yes, your Honor.
>
> THE COURT: I have my reasons. I brought it out from this foreman that it doesn't look like they can ever get together. Is that right, Mr. Foreman?
>
> THE FOREMAN: Yes.
>
> THE COURT: Is there any possibility of you getting together Monday?
>
> JUROR #6: I don't think so.
>
> THE COURT: The jurors are dispersed. It's a mistrial.

6/8/90 Tr. 112-113.

b. It is well established that a jury's inability to agree on a verdict constitutes a "manifest necessity" justifying a retrial, United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824) (Story, J.), and this Court has "constantly adhered to the rule that a retrial following a 'hung jury' does not violate the Double Jeopardy Clause." Richardson v. United States, 468 U.S. 317, 324 (1984); accord Oregon v. Kennedy, 456 U.S. 667, 672 (1982) ("While other situations have been recognized by our cases as meeting the 'manifest necessity' standard, the hung jury remains the prototypical example."); Arizona v. Washington, 434 U.S. 497, 509 (1978). Moreover, "[t]he trial judge's decision to declare a mistrial when he considers the jury deadlocked is * * * accorded great deference by a reviewing court." Arizona v. Washington, 434 U.S. at 510.

Before the district court declared the mistrial in this case, it had given two Allen charges and had seen evidence that the jury was not taking the case seriously. Moreover, the jury foreman had told the court that it was not possible for the jury to reach a verdict, that some of the jurors had stated that they would not change their minds no matter what happened, and that resumption of deliberations the following Monday would be fruitless. See United States v. Salvador, 740 F.2d at 755 (9th Cir. 1984) ("[J]ury's own statement that it is unable to reach a verdict is the most critical factor [in determining whether a mistrial is manifestly necessary]"), cert. denied, 469 U.S. 1196 (1985). Given the fact that this was a short trial with no complex issues, the district court quite properly concluded that further deliberations would not

result in a verdict. Further review of that fact-bound determination is not warranted.

CONCLUSION

The petition for a writ of certiorari should be granted as to the first question presented. With respect to the second question presented, the petition should be denied.

Respectfully submitted.

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DEBORAH WATSON
Attorney

MARCH 1992

SUPREME COURT OF THE UNITED STATES

ANA FEIJOO TOMALA *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 91-7051. Decided May 18, 1992

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE THOMAS joins, dissenting.

The issue in this case is whether the trial court erred in instructing a jury that petitioner could be convicted for importing illegal drugs if she consciously avoided knowledge that drugs were concealed in a suitcase she was carrying.

Petitioner, who had just arrived from Ecuador with her two young daughters, was arrested at Kennedy International Airport when a Customs inspector found three kilograms of cocaine in a hidden compartment of a suitcase. She was charged with importing cocaine into the United States in violation of 21 U. S. C. §952(a). At trial, petitioner defended on the theory that she had been unwittingly duped into serving as a drug courier. She testified that a woman had approached her at the Ecuador airport, identified herself as Maria Alcivar, and asked her to deliver the suitcase to Alcivar's sister, Georgina de Rodrigues. The woman opened the suitcase to show petitioner that it contained several new dresses and explained that she was returning the dresses to her sister because she had been unable to sell them in Ecuador. She provided petitioner with an incomplete New Jersey address and a telephone number, which had a New Jersey aren code followed by an eight-digit number.

The trial court charged the jury that the Government bore the burden of proving beyond a reasonable doubt that

petitioner knew she possessed narcotics. But the court added:

> "[I]t is not necessary for the government to prove to an absolute certainty that [petitioner] knew that she possessed narcotics. [Petitioner's] knowledge may be established by proof beyond a reasonable doubt that [petitioner] was aware, was aware of a high probability that the suitcase contained narcotics unless, despite this high probability, the facts show that [petitioner] actually believed that the suitcase did not contain narcotics."

Petitioner's first trial ended in a hung jury. On retrial, she was convicted and sentenced to 60 months' imprisonment. The Court of Appeals for the Second Circuit affirmed.

Petitioner contends that the trial court erred in giving the instruction quoted above because the Government had not argued that she consciously avoided knowledge that she was transporting drugs and because the instruction allows a conviction on the basis of recklessness or negligence, thereby vitiating the statutory requirement that the Government prove petitioner acted knowingly. She urges that the outcome of her case would have been different had she been tried in another circuit. The Government concedes as much, citing conflicting decisions by the Courts of Appeals for the Ninth and Tenth Circuits, and suggests that we grant certiorari. See *United States* v. *de Francisco-Lopez*, 939 F. 2d 1405 (CA10 1991); *United States* v. *Sanchez-Robles*, 927 F. 2d 1070 (CA9 1991).

I agree with petitioner and the Government that the outcome of a federal criminal prosecution should not depend upon the circuit in which the case is tried. I therefore would grant certiorari to resolve the conflict in the Courts of Appeals.